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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 275

NORTH COAST TRANSPORTATION COMPANY (a corporation) and INDEPENDENT STAGES, INC.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, WEST COAST BUS LINES, LTD., et al.,
Appellees.

PETITION OF APPELLANTS FOR REHEARING.

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PETITION OF APPELLANTS FOR REHEARING.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the States:

Come now the appellants and petition for a rehearing in the above entitled appeal and for grounds thereof respectfully show:

I. That the Supreme Court has misapprehended the principal grounds of the appeal.

II. That the three decisions cited by the Court in granting the motions to affirm are not in point.

III. That by granting the motions to affirm the Court has denied to appellants the appeal as of right granted to them by statute (28 USCA, sections 47a and 345), notwithstanding that questions of the most substantial and fundamental character are presented.

I.

THE GROUNDS OF THE APPEAL.

As shown by appellants' Statement of Points to be Relied Upon (pp. 1-2) and appellants' Statement as to Jurisdiction (p. 3), the principal grounds of the appeal are, briefly stated, as follows:

1. The order of the Commission and the "findings" upon which it is based are not supported by any evidence and are wholly contrary to the evidence.

2. The Commission was without jurisdiction of the proceeding because, as conclusively shown by the record, the applicant in fact never proposed to operate in more than three states.

3. Because of the radical change in conditions between the time of the hearing and the decision the Commission should have granted a rehearing.

We respectfully submit that more substantial grounds of appeal than the first two above set forth

could not be presented. Certainly the question that the order of the Commission and the "findings" upon which the order is based are not supported by the evidence and are contrary to the evidence, and the further question that under the applicable statute the Commission was without jurisdiction, are questions of a most fundamental character. It would appear that argument should hardly be necessary to maintain the validity of that statement.

As to the third ground of the appeal—the changed conditions between the time of the hearing and the decision—we can readily concede that it might reasonably be contended that since the granting of a rehearing on such ground is primarily one of discretion the appeal on such a ground alone might properly be denied. But we cannot assert too emphatically that, in our view, such is not the case with respect to the first two grounds.

As to the first ground of the appeal, it has always been held—without a single exception so far as we are aware—that, if there is no rational basis for the Commission's order and no real or substantial evidence to support the "findings" with respect to the basic and essential elements upon which the order is based, a substantial question is presented and that that question is properly subject to review by this Court. None of the three decisions cited by the Court supports a contrary view, nor are we aware of any decision or other authority that has ever held or made any declaration to the contrary.

It has always been a governing principle of law, and one heretofore consistently applied by numerous decisions of this Court, that the "findings" as to the basic and essential factors on which an administrative order such as that here involved is based must be supported by the evidence, and where this is not the case the order is subject to the process of judicial review. We may cite the following cases by way of example:

Interstate Commerce Commission v. Union Pacific R. Co., 222 U.S. 541, 547, 548;

Baltimore & Ohio R. Co. v. United States, 264 U.S. 258;

Chesapeake & Ohio Ry. Co. v. United States, 283 U.S. 35;

Federal Radio Commission v. Nelson Bros. B & M Co., 289 U.S. 266.

In respect to the second ground of appeal above stated, it seems equally clear that if West Coast Bus Lines, Ltd., did in fact not propose to conduct operations in more than three states, but named the fourth state in its application solely for the purpose of evading a hearing before a Joint Board under the provisions of the Motor Carrier Act (49 USCA, section 305(a)), that situation also presents a question of the most substantial character. And that question is wholly separate from the first or third ground.

Manifestly, neither of these first two grounds of appeal may be determined upon a motion to affirm. They can, in the very nature of things, only be determined by an examination or consideration of the

record. But such is not the function or office of a motion to affirm. Hence, the dismissal of an appeal pursuant to such a motion would be equivalent to holding that the question of sufficiency of the evidence and the question of jurisdiction of the Commission are not proper grounds of appeal and that an aggrieved party to a proceeding will not be heard where an appeal is based upon either or both of such grounds. We cannot believe that the Court could have intended to make such a ruling, yet that would be the actual effect of the granting of the motions to affirm in this proceeding.

II.

THE CASES CITED IN THE ORDER TO AFFIRM.

We wish to point out more specifically that in none of the cases cited in the order granting the motions to affirm was it held that the question of jurisdiction and the question of sufficiency of the evidence do not constitute substantial grounds for an appeal to this Court.

In *C. & O. Ry. Co. v. United States,* 283 U.S. 35, 42, the case first cited by the Court in the order granting the motions to affirm, the Court fully recognized the right to appeal and the right to be heard. The Court reviewed the case upon the merits and it found not only that "the facts stated in the report" on which the Commission had based its conclusions were adequate, but that they were also "sustained by the evi-

dence" and were "plainly sufficient to support the order" (p. 43). Not only did the Court not hold that the question as to whether the Commission's findings were supported by the evidence was not subject to review, but it examined the evidence and fully discussed its sufficiency. That is all that is sought by the appellants here.

In the second case cited, *United States v. B. & O. R. Co.,* 293 U.S. 454, 465, the Court dealt not with the question of the sufficiency of the evidence, but solely with the question of the sufficiency of the findings as made in the report of the Commission. The case is, therefore, not in point here because as stated in the first ground of appeal (Statement of Points to Be Relied Upon, pp. 1-2) the appellants here have waived the question as to whether "findings" were properly made and have based their appeal on the ground of total want of evidence to support these "findings".

In the third case cited, *Interstate Commerce Commission v. Jersey City,* 322 U.S. ..... (No. 767, October Term, 1943, decided May 29, 1944), the Court again considered the case upon the merits. The Court determined that "each of the findings of fact by the Commission appears to be supported by substantial evidence". If the case was cited by reason of the further holding therein in respect to the right to a rehearing before the Commission and the standing of the Price Administrator under the Emergency Price Control Act in a rate-making proceeding before the

Commission, it will suffice to note that such further holding could have reference only to the third ground of appeal in the instant case relating to changes in conditions, and could have no bearing on the other two wholly separate grounds.

III.

STATUTORY PROVISION FOR DIRECT APPEAL.

The jurisdiction of this Court is invoked under section 210 of the Judicial Code as amended (28 USCA, section 47a) and under section 238 of the Judicial Code as amended (28 USCA, section 345). As provided by section 210, a direct appeal to the Supreme Court may be taken from a final decree made by a District Court of the United States specially constituted under section 47 of Title 28 of the United States Code. Accordingly, an appeal as of right is denied to appellants by the granting of the motions to affirm and the affirmance of the judgment of the District Court, and this result occurs notwithstanding the presentation by the appeal of the substantial and fundamental questions hereinbefore set forth.

Accordingly, Appellants respectfully urge that the motions to affirm be denied, that the appeal be considered at least as to the first and second grounds pre-

sented, and that these questions be determined upon their respective merits.

Respectfully submitted,

JOHN O. MORAN,
FREDERICK W. MIELKE,
FERD J. SCHAAF,
FRED C. DORSEY,
Attorneys for Appellants.

Dated, October 27, 1944.

CERTIFICATE OF COUNSEL.

The undersigned hereby certifies that he is one of the counsel for appellants herein and that the foregoing petition for a rehearing is presented in good faith and not for delay.

Dated, October 27, 1944.

JOHN O. MORAN,
Of Counsel for Appellants.